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# MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2019

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## 1. Constitutional Law

### **X v. Tokyo Met. Govt. Election Administration Commission**

Supreme Court, February 5, 2019

Case No. (*Gyo Tsu*) 92 of 2018

1717 SAIBANSHO JIHO 1

#### **Summary:**

The Outer Islands district of the Tokyo Metropolitan Assembly is not contrary to Article 271 of the Public Office Election Act. The Assembly's electoral demarcation and distribution of fixed membership are not contrary to Article 15 of the Public Office Election Act and Article 14 Section 1 of the Constitution.

#### **References:**

Article 14 Section 1 of the Constitution, Article 15 and 271 of the Public Office Election Act, Ordinance to Provide the Fixed Membership, Electoral Districts and the Distribution of Members of the Tokyo Metropolitan Assembly.

**Facts:**

Article 15 Section 1 of the Public Office Election Act [hereinafter POEA] provides that an electoral district of prefectural assemblies shall consist one municipality or more municipalities, and the details shall be decided through prefectural ordinances. Section 2 provides that the population of a district shall be not less than  $1/2$  of the quotient of which the prefectural population is divided by the fixed membership of that assembly [the quotient hereinafter Hare Quota]. Article 271 provides that districts existing as of January 1, 1966, can exist “for the time being” if the population of the district becomes less than  $1/2$  of the Hare Quota (Such a district as this, hereinafter, exceptional district).

The Ordinance to Provide the Fixed Membership, Electoral Districts and the Distribution of Members of the Tokyo Metropolitan Assembly [hereinafter the Ordinance] provides the detail for the Tokyo Metropolitan Assembly. The population of the Outer Islands district is less than even  $1/4$  of the Hare Quota. The quotient of which the population is divided by the Hare Quota is 0.249. Still, the Outer Islands district exists after the 2016 revision of the Ordinance. Besides, the maximum ratio of the population per member of the assembly between districts is 1 to 2.48, excluding the Outer Islands district.

The plaintiff proposed three main claims. First, because Supreme Court precedents interpreted that an exceptional district is illegal if the population of the district is “extraordinarily” less than the Hare Quota, the Outer Islands district, of which the population is less than  $1/4$  of the Hare Quota, should be illegal. Second, even if the legality of the Outer Islands district is shelved, the disparity of the weight of a vote is contrary to the Article 15 of POEA. Third, even if it is not contrary to Article 15 of POEA, it is unconstitutional under the equality clause of the Constitution.

**Opinion:**

First, the legality of the exceptional district depends on whether the prefectural assembly’s decision is in the area of prefectural discretion for the development of the entire prefecture. The Court precedents held that when the exceptional district’s population is extraordinarily less than  $1/2$  of Hare Quota, it is an abuse of discretion to establish such a district.

Because the Outer Islands district covers isolated islands, their natural environment, and social and economic situation differs from the other regions of Tokyo Met., then the islands require a special government demand. There is great necessity to ensure a representative from the islands, while its geography makes it fairly difficult to merge the district into other municipals. The population of the Outer Islands district at the election day is not less than the size which should not be allowed to exist as an exceptional district. The Outer Islands District is not contrary to Article 271 of POEA.

Second, the Assembly's zoning and allocation table is contrary to the prefectural discretion that Article 15 of POEA gives when the disparity of the weight of a vote is not reasonable even allowing for average conditions to rectify regional imbalances and the special reason to justify this irrationality does not exist. The maximum ratio of disparity of the election day is 1 to 2.48 (Chiyoda district to Musashino City district). The Court cannot say it is irrational.

Third, the Assembly's zoning is not contrary to the prefectural discretion, and then it is not contrary to Article 14 Section 1 of the Constitution.

#### Opinion of Justice Hayashi Kei'ichi

The rule of proportionality to population can be loosened as for local elections. To operate citizenry-autonomous government based on the principle of local autonomy [Article 92 of the Constitution], members of local government assemblies should be characterized more strongly as representatives of the community rather than those of the people.

#### Editorial Notes:

This case reviewed the constitutionality and the legality of the Outer Islands district of the Tokyo. Met. Assembly for the first time. The standard of review follows the precedents: whether the exceptional district's population is extraordinarily less than 1/2 of Hare Quota. But the precedents and this case do not show precisely when the population is "extraordinarily less". A past concurrence opinion suggested that the population is "extraordinarily less" if it is less than 1/4 of Hare Quota[47 MINSHU 5147 (1993), Justice Fujishima Akira]. In this case, the Outer Islands district's population is less than 1/4 of Hare Quota. But the Court

held it is constitutional, and the standard of Justice Fujishima is left unused.

Second, as for the zoning and allocation table, the precedents have made a decision whether the maximum ratio of disparity is more than 1 to 3 for local elections. In this case, 1 to 2.48 ratio, it is also not declared illegal.

Third, the plaintiff claimed that Articles 15 and 271 of POEA themselves are contrary to Article 14 Section 1 of the Constitution, suggesting that they give too much discretion to prefectural assemblies. The Court read it as claiming the unconstitutionality of the Ordinance. Like the precedents, the constitutionality review based on Article 14 Section 1 is reduced to a discretionary review based on the POEA.

Fourth, the concurrence of Justice Hayashi seems to hold that members of local assemblies are the representatives of a community, in other words, the representatives of municipals (cities, towns and villages). But prefectural assemblies should be regarded as the representatives of “prefectural citizens” rather than municipals. Direct election for assemblies (Article 93 Section 2 of the Constitution) suggests so.

Fifth, the issue of the weight of a vote of prefectural assemblies is fundamentally from POEA itself. Article 15 of POEA provides the One Municipal, One District rule (if a municipal is too small to exist a district, it is merged into another district). Because of this, allocation of seats differs from one district to another (8 seats for Setagaya district, 1 seat for Chiyoda district, for example). Besides, in an at-large district, the Single-Non-Transferrable Vote is used. Its characteristic features make party-organization difficult and spread corruption [See former Minister of Justice Kawai’s corruption for Upper House Hiroshima SNTV district in 2019 Election]. To reform the election system radically, one direction is to establish FPTP districts regardless of municipal boundary (majority representation). Another is to introduce a proportional representation system (Party list system or STV system).